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NO. 529

IN THE

# Supreme Court of the United States

October Term, 1961

LOFFLAND BROTHERS COMPANY
and
THE TRAVELERS INSURANCE COMPANY,
*Petitioners*

v.

WILLIE J. TEICHMAN and
C. D. CALBECK, DEPUTY COMMISSIONER
and the
UNITED STATES OF AMERICA, *Respondents*

## RESPONDENT TEICHMAN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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*To The Honorable Chief Justice And Justices:*

This Respondent-Claimant respectfully files this his reply to the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit which has heretofore been filed.

## QUESTION FOR REVIEW

Does the record made before the Deputy Commissioner, considered as a whole, support this finding by him:

> "On the said day claimant . . . sustained personal injury resulting in disability. Two events were described as having occurred . . . either of which could have produced bodily injury . . . As to this first event, . . . a jury found that no injury was sustained . . . No injury was sustained by the claimant as the result of the first event. It is therefore inescapable and I find that as a consequence of the second event, claimant sustained an injury . . ."[1]

## STATEMENT OF THE CASE

The following is undisputed in the evidence:

1. The employer reported to the Deputy Commissioner that Respondent-Claimant had sustained an injury on January 1, 1956.

2. The Respondent-Claimant filed his claim with the Deputy Commissioner alleging both injuries, and this is the claim on which he went to trial before the Deputy Commissioner.

3. The insurance carrier investigated the claim of injury; and, as a result of the investigation, it paid compensation and furnished medical attention without question for nineteen weeks.

4. Respondent-Claimant's history as taken by the treating doctor, included both events as causes for his injury.

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1 Petition for writ, p. 18

5. The treating doctor believed that the injury of January 1, 1956, was a cause, either directly or as aggravation of a prior condition, of his disability to labor.

6. The Respondent-Claimant had been able to do hard manual labor regularly for the entire year before January 1, 1956, and had not needed to be, and had not been treated for any back condition during that time.

7. There is no medical evidence in the record before the Deputy Commissioner that Respondent-Claimant's disability was unrelated to his injury. Indeed, the insurance carrier did not call any of its treating doctors to testify. And, the doctors it did call knew nothing of his condition from at least a year preceding January 1, 1956, down to the date of trial.

## REASONS RELIED UPON FOR DENYING THE WRIT

1. *Estoppel by judgment*[2]

Unless the findings of the Deputy Commissioner are unsupported by substantial evidence in the record as a whole such findings should be sustained by the Court. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 71 S. Ct. 470. The burden is upon him who attacks the finding to show it is not supported by the evidence as a whole. *Mississippi Shipping Co. v. Henderson*, 231 F. 2d 457; *Southern Stevedoring Co. v. Henderson*, 175 F. 2d 863. The findings of the Deputy Commissioner are presumed correct. *Burley Welding Works, Inc., v.*

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[2] Relevant to Petition for Writ, pp. 7-11.

*Lawson*, 141 F. 2d 964. Logical inferences and deductions drawn from the evidence by the Deputy Commissioner should be accepted and will not be reviewed even if the evidence also lends itself to other and different inferences and deductions. *O'Leary v. Brown-Pacific-Maxon, Inc.*, supra,[3] *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 62 S. Ct. 221; *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 67 S. Ct. 888; *Southern Stevedoring Co. v. Henderson*, 175 F. 2d 863.

On the above principles, the District Court found:

> "A second question, as to the sufficiency of the evidence to support the findings of the Deputy Commissioner, must be determined in favor of the award. *There was sufficient evidence to that effect. . . .*" (Emphasis supplied)[4]

The argument of the Petitioners is predicated upon a substitution of the word "disability" for the word "injury" in the only special interrogatory submitted to and answered by the jury in the earlier *Jones Act* case, plus a speculation as to the mental processes of that jury as it answered that question.

There was really no reason for the jury to speculate as to possible causes for Respondent-Claimant's "disability" beyond that which was inquired about in the special interrogatory. But, if it had so speculated, it is not outside the realm of possibility that some or all of them might have felt the incident inquired about was entirely too minor to have produced his "disability" or to have aggravated his pre-existing condition enough to produce his

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[3] 340 U.S. 504, 71 S.Ct. 470.

[4] Petition for Writ, p. 23.

"disability". It is equally possible that had the jury known about and been asked about the "second incident," some or all of them might have believed it sufficient to have caused Respondent-Claimant's "disability" or to have aggravated his pre-existing condition and thereby cause "disability." More important, if the jury had had before it the same evidence that was before the Deputy Commissioner, perhaps it, like the Deputy Commissioner, would have felt that if the "first event" did not "injure" Respondent-Claimant, then "it is . . . inescapable, . . . that as a consequence of the second event, claimant sustained an injury. . . ."[5]

In other words, the state of the minds of the jurors as they answered this special interrogatory is not necessarily that which Petitioners speculate it was.

The evidence before the Deputy Commissioner was more than adequate to support his deductions, inferences and findings. *Dixie Sand & Gravel Corp. v. Holland*, 255 F. 2d 304.

2. *Inconsistent Positions as an Estoppel.*
3. *Election of Remedies.*[6]

In connection with these arguments of Petitioners, it is to be remembered that the issue of whether Respondent-Claimant was or was not a seaman was *not* determined in Civil Action 2267. The Petitioners originally took the position that Respondent-Claimant was a maritime worker under the Act. The Deputy Commissioner, on the evidence before him, held that Respondent-Claimant was a maritime worker under the Act. Up to that time, his was the only

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5 Petition for writ, p. 18.

6 Relevant to Petition for Writ, pp. 11-13.

judicial or quasi-judicial determination of Respondent-Claimant's status under either the Jones Act, as a seaman, or under the Longshoremen's & Harbor Workers' Compensation Act, as a maritime worker under its terms.

Whether or not Respondent-Claimant was a seaman entitled to the benefits of the Jones Act, 46 U.S.C.A. 688, was undoubtedly an issue of fact to be determined by a trier-of-the-facts. *Offshore Company v. Robinson*, 266 F. 2d 771.

It is unquestioned that this issue was not determined in Civil Action 2267 by either the Court or the jury. It is equally unquestionable that the Deputy Commissioner found Respondent-Claimant to be a maritime worker within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901, et seq. Having done so, the Trial Court was " . . . consequently limited to an inquiry into the existence of any evidence to support the Deputy Commissioner's finding that . . . (he) was not a crew member." *Puget Sound Freight Lines, et al. v. Marshall, Deputy Commissioner*, 125 F. 2d 876, 878.

As the Trial Court said:[7]

> "The Jones Act and the Compensation Act were designed to afford relief against their respective employers to two different classes of employees—the Jones Act applying to 'any seaman who shall suffer personal injury in the course of his employment.' (46 U.S.C.A., § 688), while the Compensation Act gives an exclusive remedy by way of compensation against the employer to any maritime employee who is not 'a master or member of a crew of any vessel' (33 U.S.C.A., § 903); *Swanson v. Marra Brothers*,

[7] Petition for writ, p. 24.

328 US 1 (1945); *Offshore Company v. Robinson*, 266 F. (2d) 769 (1959)."

The Jones Act cannot and does not apply unless the plaintiff is in law and in fact a "seaman." The Compensation Act cannot and does not apply unless the claimant is a maritime employee who is not "a master or member of a crew of any vessel." As we have indicated, both are matters for determination by a trier-of-the facts.

Section 913(d) of the Act provides:

> "Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time prescribed in subdivision (a) of this section shall begin to run only from the date of termination of such suit. Mar. 4, 1927, c. 509, Sec. 13, 44 Stat. 1432."

Let us assume that the issues in Civil Action 2267 had been submitted in a different order so that the first question to be answered by the jury would have been one inquiring as to his status as a seaman under the Jones Act. Let us assume further that the jury answered "he was not." No other question would have been required to be answered because Respondent-Claimant could not have prevailed against his employer in that suit no matter what answers the jury made to the remaining questions. A judgment would then have been entered for the Petitioners just as was actually done here. Is it not clear that Section 913(d) would authorize him to revert to a claim under the Act, even though he had not timely filed his claim

with the Deputy Commissioner? If so, is this not express sanction for the claimant to take both positions, as Respondent-Claimant has done here? If not, then this entire provision of the Act has no meaning whatsoever. Nor do we think it can make any difference that Respondent-Claimant voluntarily abandoned his claim that the facts of his employment showed him to be a seaman, rather than having had a judicial determination that he was not. See *Ayers v. Parker*, 15 F. Supp. 447; *Dixie Sand & Gravel Corp. v. Holland*, 255 F. 2d 304; *Pacific Employers Insurance Co. v. Pillsbury*, 130 F. 2d 21; *Kibodeaux v. Standard Dredging Co.*, 81 F. 2d 670.

There are two other provisions of the Longshoremen's & Harbor Workers' Compensation Act which we think offer strong evidence against Petitioners' position.

Section 920(a) provides as follows:

> "In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of this chapter."

Section 915(b) provides:

> "No agreement by an employee to waive his right to compensation under this chapter shall be valid."

If the employee cannot voluntarily "waive" his rights under the Act, and if it is "presumed in the absence of substantial evidence to the contrary that the claim (Respondent-Claimant's) comes within" the Act, and the Deputy Commissioner, upon hearing evidence, finds the

claim within the Act—there having been no previous final judicial determinaton to the contrary—it is difficult to visualize exactly how Respondent-Claimant is estopped to assert his remedy under the Act by anything that took place in Civil Action 2267.

WHEREFORE, Respondent-Claimant prays this Honorable Court to deny the granting of a Writ herein.

Respectfully submitted,

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By _____

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## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing brief was served upon Messrs. Barker, Barker & Coltzer, 202 Merimax Building, Galveston, Texas, and Mr. Bryan F. Williams, Jr., Cotton Exchange Building, Galveston, Texas, Attorneys for Petitioners, Loffland Brothers Company and The Travelers Insurance Company; and upon Mr. Woodrow P. Seals, United States Attorney, Post Office Building, Houston, Texas, and Mr. Morton Holland, c/o Department of Justice, Washington, D.C., Attorneys for C. D. Calbeck, and the United States of America, by mailing two copies to each of them.

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Herman Wright